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EXAMINER	
BROOKS, MATTHEW L	

ART UNIT	PAPER NUMBER
3629	

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/026,038	SOLOMON ET AL.	
	Examiner	Art Unit	
	Matthew L. Brooks	3629	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *12/19/2001*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☒ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *19 December 2001* is/are: a)☐ accepted or b)☒ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Drawings

1. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description:

Figure 1 is missing flow diagram lead line **100**.

Figure 10 is almost completely improperly labeled throughout

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

In addition to Replacement Sheets containing the corrected drawing figure(s), applicant is required to submit a marked-up copy of each Replacement Sheet including annotations indicating the changes made to the previous version. The marked-up copy must be clearly labeled as "Annotated Sheets" and must be presented in the amendment or remarks section that explains the change(s) to the drawings. See 37

CFR 1.121(d)(1). Failure to timely submit the proposed drawing and marked-up copy will result in the abandonment of the application.

Specification

2. The disclosure is objected to because of the following informalities:

In the specification Applicant while referring to FIG 1, on the top page 11 of Specification refers to "DMCA rules are applied 105" yet it appears Applicant intended step 106.

The "special business rule" as mentioned on page 22 has no real definition, and examiner cannot decipher one.

"Global Rating Scaling Factors" as mentioned on page 21 are not defined in the specification and Examiner cannot decipher a meaning or application thereof.

Appropriate correction is required.

Claim Rejections - 35 USC § 112 1st Paragraph

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. **Claims 1-20** are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

It should be **noted** that there are at least two ways to interpret Applicant's claims. One would be that the invention simply relates to a user rating music and influencing a play list, this is old and well known with in the art. The other interpretation could be that the Applicant is claiming a complicated algorithm in combination with several factors that produce a play list which in turn is played. The later example requires more guidance and direction (as originally filed) in order to enable the invention. If Applicant intends the later interpretation then less may be known in the art and the art is less predictable, thus the specification needs to show more detail (specific and useful) as to how to make and use the invention in order to be enabling in order for the public's end of the bargain to be struck. See, e.g., Chiron Corp. v. Genentech Inc., 363 F.3d 1247, 1254, 70 USPQ2d 1321, 1326 (Fed. Cir. 2004).

5. With respect to **Claim 1 and 14, line 6 "applying user calibrators"** and **Claims 8 and 18** Examiner has relied on Applicant's definition found with in the specification Pages 15-17 and FIG 4. Application is missing information about one or more essential parts or relationships between parts which one skilled in the art could not develop without undue experimentation. Specifically the Applicant states "apply user calibrators", however Applicant fails to state (both in the claims and the specification) what "user calibrators" is being applied to. The specification did not particularly identify (FIG 4) the blocks or the relationship there between, nor did it specify particular apparatus intended to carry out each function. Furthermore, a clear definition of what a "user calibrator" actually is cannot be found within the specification. Because the definition of what a user calibrator is and the relationship user calibrator has to the

invention (what it is applied to) are both missing, one skilled in the art could not develop this invention without undue experimentation.

Furthermore, Applicant states "**U**ser **C**alibrators values are comprised of the explicitly defined values from a user's song and artist ratings and the *implicitly defined values* resulting from the *RNS correlated music values*. (see pg 15, bottom)" (Emphasis added to the U/C to demonstrate Applicant now is capitalizing the word as if to give special meaning, where just in the previous sentence no such capitalization was found, there must be consistency in order to avoid undue experimentation) (Emphasis added to implicitly defined values, because Applicant fails to define this and Examiner cannot determine what Applicant intends or Applicant's intended scope) (Emphasis added to RNS correlated music values because Applicant fails to define this and Examiner cannot determine with out undue experimentation what Applicant intends or Applicant's intended scope).

Furthermore on Page 16, Applicant goes on about "User Calibrators" yet none of what is mentioned is shown on FIG. 4 and when Applicant says "this process will consist of a *conversion* only at the time of initial artist rating" Examiner can only presume that process/conversion/ and applying user calibrators is all but the same.

Furthermore on Page 16, second full paragraph last sentence the Applicant states "Next, the user's deletes are removed from the remaining pools." Yet when Examiner looks to FIG. 4 all that stands out is a dotted line/arrow that says "User Deletes Removed" but the Figure actually fails to be of any help or show anything of use to Examiner, which would lead to undue experimentation.

Furthermore the last Paragraph on Page 16 is not shown anywhere within any FIGS let alone Fig 4. Furthermore the Applicant has failed to make clear or tie this paragraph back into a "user calibrator".

Furthermore the first Paragraph on page 17 is **not** enabled, in FIG 4, and understandable. Applicant states "Correlation values are applied by overwriting any existing value of any song that the user has not already rated with the *user's correlated value* since the music pools are all..." The term given emphasis is not mentioned elsewhere in the specification and Examiner is unable to give meaning to the term or would require undue experimentation in order to do so. Also the term "MUSICTEK" is not defined with in the specification and Examiner is unable to give meaning to the term (Note: that a google search was conducted and all that was found was www.musiktek.com). And due to all of the aforementioned problems Examiner cannot determine the meaning of the last sentence of the first paragraph on page 17 and to do so would result in undue experimentation.

6. With respect to **Claim 1, line 7 and Claim 14 line 7** "*correlating* user rated songs with normalized music pools. Examiner was unable to find a special meaning for "correlating", then turned to the Merriam-Webster Dictionary to find this meaning:

> **1 a :** to establish a mutual or reciprocal relation between <*correlate* activities in the lab and the field> **b :** to show correlation or a causal relationship between
>
> **2 :** to present or set forth so as to show relationship <he *correlates* the findings of the scientists, the psychologists, and the mystics -- Eugene Exman>

Examiner is uncertain if this is what Applicant intended or not and furthermore the specification does not enable the invention and would require undue experimentation. In fact the specification give Examiner no indication of how a user would even rate songs, though this likely is predictable and would not be undue.

7. With respect to **Claim1, line 8 and Claim 9 and Claims 14, line 8 and Claim 19;** "applying global calibrators" is not defined or enabled within Applicant's specification. Examiner relied upon FIG. 5 and the second paragraph of Page 17. On page 17 the Applicant states "apply Global Calibrators which are artist and song popularity" (NOTE: Applicant once again fails to state what the Global Calibrators are applied to.) Furthermore, Applicant fails to enable a standard upon which "popularity" is based, rather Applicant simply states The RNS sets popularity values. And looking to FIG 5. Examiner cannot distinguish the difference between applying "global" or "user" calibrators, except for the dotted line/arrow and further Examiner fails to see how FIG. 5 in combination with Paragraph 2, page 17 in combination enables "Global Calibrators" and how it relates to the invention and to do so would require undue experimentation.

8. With respect to **Claims 1, line 9 and Claim 10 and Claim 14, line 9**; "applying dynamic calibrators" Application is missing information about one or more essential parts or relationships between parts which one skilled in the art could not develop without undue experimentation. Specifically the Applicant states "apply dynamic calibrators", however Applicant fails to state (both in the claims and the specification) what "dynamic calibrators" is being applied to. The specification did not particularly identify (FIGS 6A-6B) the blocks or the relationship there between (an example includes

applicant fails to ever mention what "WJBR" is), nor did it specify particular apparatus intended to carry out each function. Furthermore, a clear definition of what a "dynamic calibrator" actually is cannot be found within the specification. Because the definition of what a dynamic calibrator is and the relationship dynamic calibrator has to the invention (what it is applied to) are both missing, one skilled in the art could not develop this invention without undue experimentation.

Furthermore on last paragraph on page 17 Applicant says the Dynamic Calibrators determine the New Music Pool rather than being applied to it. In addition Applicant fails to show the relationship between the New Music Gauge and the Dynamic Calibrators and essentially just lists the items leaving an unreasonable amount of experimentation to be performed by examiner.

Furthermore in the last paragraph on page 18, Applicant states that the Music Selector Gauge (note: that the name has suddenly change from "New Music Gauge") settings are also used to determine the Music Mixer of figures 6A and 6B. However, FIG 6A shows the New Music Gauge set on frequently, while 6B shows the New Music Gauge set on rarely, yet no effect is shown on the Music Mixer.

In regards to the "Music Mixer", as presently set forth, the Music Mixer is essentially a black box with no description of the internals thereof. The disclosure is thus insufficient in failing to set forth in an adequate and sufficient fashion, a description of the internals and workings of the method which would enable performance of all of the features (i.e., inputs, conditioning, etc.) that are disclosed and claimed. If applicant is of the opinion that there is a description in the prior art (in the form of literature, etc.

having a date prior to the filing date of this application), of the internals of the "Music Mixer" that can accomplish the disclosed and claimed features (i.e., inputs, conditioning, etc.), copies of said literature, etc., must be submitted for appropriate review by the Office. See In re Ghiron et al, 169 USPQ 723, 727.

Furthermore on bottom of page 20 and top of page 21, the Applicant interrelates a "Global Rating Scaling Factor" which is neither defined with in Applicant's definitions pages 11-13 or does the Applicant demonstrate the relationship the "Global Rating Scaling Factor" has to do with the dynamic calibrators and for Examiner to determine what this information is or how it works would require unreasonable experimentation.

Claim Rejections - 35 USC § 112 2nd Paragraph

9. The following is a quotation of the **second paragraph of 35 U.S.C. 112**:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

10. **Claims 1-20** are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

As mentioned in the previous 112, first paragraph Examiner cannot determine the meaning of "user calibrators", "global calibrators" and "dynamic calibrators". And furthermore the Claims are indefinite because the three aforementioned calibrator's definition is not found with in the specification.

11. **Claims 1-20** rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential steps, such omission amounting to a gap between the steps. See MPEP § 2172.01. The omitted steps are: found with in **Claim 1 lines 6,8,9**

and **Claim 14 lines 6,8,9** in which applicant never states what the calibrators are applied to.

12. **Claims 1 and 14** recite the limitation "identifying individual user information and user selected radio station information" in line 4 is indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is unclear where from and or how the types of information were obtained.

13. **Claims 1 and 14** recite the limitation "correlating user rated songs with normalized music pools" in line 7 is indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is unclear what and where from the user rated songs come from.

14. **Claims 3 and 16** recite the limitation "...the affiliate music pool, national generic music pool, a new music pool and the user rated music pool". There is insufficient antecedent basis for this limitation in the claim.

15. **Claim 5 and 17** recite the limitation "...where said identifying user information..." There is insufficient antecedent basis for this limitation in the claim. Because prior to this claim Applicant has only claimed identifying "individual user information" which also had a lack of antecedent basis.

16. **Claim 6** recites the limitation "...by the affiliate radio station." in. There is insufficient antecedent basis for this limitation in the claim.

17. **Claim 7** recites the limitation " the affiliate music pool replaces the same music format of the national generic music pool." There is insufficient antecedent basis for this

limitation in the claim. Also, Examiner has referred to the specification definitions Pages 12 and 13 and cannot decipher the meaning of this claim because it is indefinite.

18. **Claims 9 and 19** recite the limitation "...the radio network service, radio stations and record labels." There is insufficient antecedent basis for this limitation in the claim.

19. **Claim 10** recites the limitation "where said dynamic calibrators comprises the radio station specified mix value of radio station and national music versus user rated deep cuts, the user music selector gauge setting and the new music gauge setting." There is insufficient antecedent basis for this limitation in the claim.

20. **Claim 11** recites the limitation " ... the radio station specified mix value comprises a user deep cuts gauge setting." There is insufficient antecedent basis for this limitation in the claim.

21. With respect to **Claims 1 and 14; line10, Claim 12, Claim 13, and Claim 20** these claims are rejected as being indefinite. Laws in general are subject to change and interpretation and the Examiner is unsure of the scope of the invention. Furthermore, as an example, on page 22 of the specification, Applicant advised "the key components for compliance are detailed in this quote from Webcaster.org," However, this website is no longer in existence and furthermore the "wayback machine" indicates that this site had not even been created till July 25th 2001, several months after the filing of the provisional application.

Claim Rejections - 35 USC § 101

22. 35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 1-20 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter The claimed invention is not within the technological arts.

As an initial matter, the United States Constitution under Art. I, §8, cl. 8 gave Congress the power to "[p]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". In carrying out this power, Congress authorized under 35 U.S.C. §101 a grant of a patent to "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof." Therefore, a fundamental premise is that a patent is a statutorily created vehicle for Congress to confer an exclusive right to the inventors for "inventions" that promote the progress of "science and the useful arts". The phrase "technological arts" has been created and used by the courts to offer another view of the term "useful arts". See *In re Musgrave*, 167 USPQ (BNA) 280 (CCPA 1970). Hence, the first test of whether an invention is eligible for a patent is to determine if the invention is within the "technological arts".

Further, despite the express language of §101, several judicially created exceptions have been established to exclude certain subject matter as being patentable subject matter covered by §101. These exceptions include "laws of nature", "natural phenomena", and "abstract ideas". See *Diamond v. Diehr*, 450, U.S. 175, 185, 209 USPQ (BNA) 1, 7 (1981). However, courts have found that even if an invention incorporates abstract ideas, such as mathematical algorithms, the invention may nevertheless be statutory subject matter if the invention as a whole produces a "useful, concrete and tangible result." See *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* 149 F.3d 1368, 1973, 47 USPQ2d (BNA) 1596 (Fed. Cir. 1998).

This "two prong" test was evident when the Court of Customs and Patent Appeals (CCPA) decided an appeal from the Board of Patent Appeals and Interferences (BPAI). See *In re Toma*, 197 USPQ (BNA) 852 (CCPA 1978). In *Toma*, the court held

that the recited mathematical algorithm did not render the claim as a whole non-statutory using the Freeman-Walter-Abele test as applied to *Gottschalk v. Benson,* 409 U.S. 63, 175 USPQ (BNA) 673 (1972). Additionally, the court decided separately on the issue of the "technological arts". The court developed a "technological arts" analysis:

> The "technological" or "useful" arts inquiry must focus on whether the claimed subject matter...is statutory, not on whether the product of the claimed subject matter...is statutory, not on whether the prior art which the claimed subject matter purports to replace...is statutory, and not on whether the claimed subject matter is presently perceived to be an improvement over the prior art, e.g., whether it "enhances" the operation of a machine. *In re Toma* at 857.

In *Toma*, the claimed invention was a computer program for translating a source human language (e.g., Russian) into a target human language (e.g., English). The court found that the claimed computer implemented process was within the "technological art" because the claimed invention was an operation being performed by a computer within a computer.

The decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* never addressed this prong of the test. In *State Street Bank & Trust Co.,* the court found that the "mathematical exception" using the Freeman-Walter-Abele test has little, if any, application to determining the presence of statutory subject matter but rather, statutory subject matter should be based on whether the operation produces a "useful, concrete and tangible result". See *State Street Bank & Trust Co.* at 1374. Furthermore, the court found that there was no "business method exception" since the court decisions that purported to create such exceptions were based on novelty or lack of enablement issues and not on statutory grounds. Therefore, the court held that "[w]hether the patent's claims are too broad to be patentable is not to be judged under §101, but rather under §§102, 103 and 112." See *State Street Bank & Trust Co.* at 1377. Both of these analysis goes towards whether the claimed invention is non-statutory because of the presence of an abstract idea. Indeed, *State Street* abolished the Freeman-Walter-Abele test used in *Toma*. However, State Street never addressed the second part of the

analysis, i.e., the "technological arts" test established in *Toma* because the invention in *State Street* (i.e., a computerized system for determining the year-end income, expense, and capital gain or loss for the portfolio) was already determined to be within the technological arts under the *Toma* test. This dichotomy has been recently acknowledged by the Board of Patent Appeals and Interferences (BPAI) in affirming a §101 rejection finding the claimed invention to be non-statutory. See *Ex parte Bowman*, 61 USPQ2d (BNA) 1669 (BdPatApp&Int 2001).

In the present application, the limitations and particularly **Claims 1 and 14** (although in the preamble) does not tie in the use of technological arts in the claim. Such as the use of the/a computer to execute the method nor is any other technology employed and it is unclear what step/s, if any, are performed by a computer.

Claim Rejections - 35 USC § 102

23. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

24. **Claims 1-20** are rejected under 35 U.S.C. 102(b) as being disclosed by the article "LAUNCH.com Announces Availability of LAUNCHcast for Music Fans; More Than 100,000 Users Join Ultimate Streaming Music Service During Beta Preview"; Business & Entertainment Editors. Business Wire. New York: Feb 16, 2000. (Business Wire) Note that because applicant has added enormous amounts of new matter to the Application compared to the provisional, the later filing date of 12/19/2001 was used for

purposes of examination. Applicant should note that Examiner could have used the provisional date for purposes of examination and still rejected under 102(a).

25. With respect to **Claim 1 and 14**: Business Wire discloses

a method of a programmable algorithm to determine a unique play list for the individual Internet radio user comprising (See Page 1, line 9 wherein users teach and therefore Launchcast learns by fuzzy logic, which inherently involves algorithms):

accessing normalized music pools (See Page 1, line 10 wherein 60,000 songs are available);

identifying individual user information (See Page 1, line 7 "members" therefore Launchcast must have identified user information) and user selected radio station information (See Page 1, line 8-9 wherein it uses their member station information to play the songs the user wants);

selecting music lists from the normalized music pools (Page 1, lines 5-6 wherein users select the music that they want to hear);

applying user calibrators (Page 2, lines 5-7 where in users "RATE MUSIC" which to Examiner is applying user calibrators);

correlating user rated songs with normalized music pools (Page 1, lines 8-9 where in user rates the songs and they get pulled from the normalized pool);

applying global calibrators (See page 1, line 11 where in LAUNCHcast has songs available in "genres" which is a global calibrator as defined in claim 9);

applying dynamic calibrators (See Page 1, line 8 and Page 2, lines 5-11wherein users can sample other users rated songs and where users can browse by popularity); and

adjusting the play list in accordance with local laws (Inherently LAUNCHcast must conform to/comply with local laws in order to stay in business).

26. With respect to **Claims 2 and 15**: Business Wire discloses

where said normalized music pools is regularly updated (See Page 1, line 11 wherein more songs are continuously added).

27. With respect to **Claim 5 and 17**: Business Wire discloses

where said identifying user information comprises user identification and stored user files (Page 2, lines 1-2 wherein because users can ID other users and subscribe to their stations, LAUNCHcast must keep user identification and stored userfiles).

28. With respect to **Claim 8 and 18**: Business Wire discloses

where said user calibrators comprise user rated songs and artists and user song and artist deletions (See Page 1, lines 7-9 wherein users rate songs and artists and users tailor music to their tastes so inherently they are capable of deleting songs) and where.

29. With respect to **Claim 9 and 19**: Business Wire discloses

where said global calibrators comprise music selections influenced by the radio network service, radio stations and record labels (See page 1, line 11 wherein LAUNCHcast has songs available in "genres" which is a global calibrator and Page 2,

lines 6-7 in which Examiner notes that radio stations and record labels determine genre and popularity).

30. With respect to **Claim 10 and 11**: Business Wire discloses

dynamic calibrators comprises the radio station specified mix value of radio station and national music versus user rated deep cuts, the user music selector gauge setting and the new music gauge setting. Examiner considers this to mean that dynamic calibrators are simply the popularity of the song and its popularity among users and that users simply have the capability to select the music. (See Page 1, lines 7-10 and Page 2, 5-11 wherein if users can select music that they want to hear there must be a music selector gauge.)

And where the radio station specified mix value comprises a user deep cuts gauge setting. Which Examiner has interpreted to meant simply that a user can have a "play the music that I have rated or selected setting." Which Business Wire discloses see Page 1, lines 3-6.

Claim Rejections - 35 USC § 103

31. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

32. **Claim 3 and 16** are rejected under 35 U.S.C. 103(a) as being unpatentable over Business Wire. Business Wire discloses that there are 60,000 songs available (Page 1, lines 10-11) and that users can rate songs and browse them by popularity (Page 2, 5-

11). When Examiner turns to Page 12 of Applicant's specification for the definitions to analyze the claims the "affiliate music pool, national generic music pool, a new music pool and the user rated music pool" has been interpreted by examiner to mean simply different ways of categorizing music so that users may select from different categories. Whether it be new music or rated music. That being the case when a user is using LAUNCHcast as disclosed in Business Wire, which disclosed at least categorizing by popularity and genre it would be obvious to one skilled in the art to further classify the pools in a number of different pools regardless of the terminology applied so that users could more easily search for the music they wanted (such as "new music").

Furthermore Applicant has not disclosed that merely labeling the pools as such has solved any stated problem or is for any particular purpose. Moreover it appears that Business Wire has disclosed the internet radio concept substantially as claimed, and it appears that the radio service would perform equally well with the labels popularity and genre. Accordingly it would have been obvious to one having ordinary skill in the art at the time the invention was made to further categorize music pools because it appears to be an arbitrary design consideration which fails to patentably distinguish over Business Wire.

33. **Claim 4** is rejected under 35 U.S.C. 103(a) as being unpatentable over Business Wire. LAUNCHcast allows other users to subscribe/view/or listen to other users stations therefore there must be some type of radio station identification. Inherently in order to perform properly the music formats must be allowed and to display this would be obvious. As to the "mix value of affiliate music" this is not defined in the

specification, however Examiner deems this to mean the popularity of music which Business Wire discloses. To show the popularity to the user would be obvious in order to allow the user to select music by popularity. As to the a "national music versus user rated deep cuts" which is not defined in Applicant's specification, Examiner deems this to mean how music compares as rated by users to what the "professional organizations" (persons or groups whose daily responsibility is composed of giving music statistics) have rated the music. To display this would be, in not inherent, obvious based upon Page 2, lines1 and 5-8 wherein users can discover new music through other users or can browse by popularity.

34. **Claim 6** is rejected under 35 U.S.C. 103(a) as being unpatentable over Business Wire. Business Wire discloses selecting music lists from normalized music pools (Page 1, lines 10-11). Business Wire does not per se disclose selecting by music formats allowed by the affiliate radio station. Examiner hereby takes official notice that it would be obvious that the LAUNCHcast system would obviously only allow music to be selected that is allowed by the affiliate radio station.

35. **Claim 7** is rejected under 35 U.S.C. 103(a) as being obvious over Business Wire. The claim "further comprises the affiliate music pool replaces the same music format of the national generic music pool." Examiner has interpreted this claim to mean simply that the online music content is put in the proper format. Business Wire discloses delivering its musical content on the internet (See Page 2,lines 22-26) and does not per se disclose the replacement of format. However, it would be obvious to one of ordinary

skill in the art that in order to gather the 60,000 plus songs (Page 1, lines 10 and 11) that the music must have been properly formatted for digital/internet delivery.

36. **Claims 12, 13 and 20** are rejected under 35 U.S.C. 103(a) as being unpatentable over Business Wire as applied to claims above, and further in view of "Launch Media Debuts Revolutionary New Music Service: LAUNCHcast; LAUNCH.com Delivers "Music That Listens to you""; Business Editors, High-Tech Writers. Business Wire. New York: Nov 11, 1999. pg 1 (Business Wire 2).

Where Business Wire 2 discloses on Page 2, first full paragraph compliance with DMCA.

Also Examiner take official notice that it is obvious and well know to have a back up emergency play list for many reasons including that if the chosen play list cannot conform. Which is how LAUNCHcast as disclosed would obviously ensure compliance with DMCA.

Conclusion

37. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Patent number 6,477,704 in which a pre-determined formula is applied to the information in the request data base to determine which of the most requested media segments are assembled into a play list. Compliance with local laws is disclosed along with a user history file, catalog database, and popular requests.

Patent number 6,609096 in which a method is disclosed for maintaining a user profile, listening history, and playing songs user is more likely to enjoy. Also disclosed is users ratings and user's predicted ratings via the use of an algorithm for radio stations.

Patent number 6,748,237 in which a method is disclosed to automate the selection of audio broadcast signals based upon preference criterion.

Pub. NO.: US 2003/0229537 which discloses a method using an algorithm for presenting a radio station and play list to users according to their preference criterion. Also disclosed are the music pools by categories and compliance with DMCA.

Also a print out of the web page www.LAUNCH.com as of 6/19/2000 is relied upon and attached which shows ability to rate music and create a user's own video and audio channels.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew L. Brooks whose telephone number is (571) 272-8112. The examiner can normally be reached on Monday - Friday; 8 AM - 5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Weiss can be reached on (571) 272-8112. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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